SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-512

ALAN F. HUGHES, INC. and ALAN F. HUGHES,

Petitioner,

—v.—

SECURITIES INVESTOR PROTECTION CORPORATION
SECURITIES AND EXCHANGE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

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BRIEF IN OPPOSITION OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

Opinion Below

The opinion of the Court of Appeals is reported as *Securities and Exchange Commission* v. *Alan F. Hughes, Inc.*, 481 F.2d 401 (2d Cir. 1973).[1]

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[1] Respondent Securities and Exchange Commission did not participate in the appeal to the Court of Appeals.

Jurisdiction

Respondent Securities Investor Protection Corporation ("SIPC") does not contest the the jurisdiction of this Court.

Constitutional Provisions and Statutes Involved

The petition sets forth Section 6(b)(1)(A) of the Securities Investor Protection Act of 1970 ("1970 Act") [15 U.S.C. § 78fff(b)(1)(A)]. The petition omits reference to Section 6(f) of the 1970 Act [15 U.S.C. § 78fff(f)] which limits the use of SIPC's funds to advances for customer claims [subdivision (1)], and provides in subsection (2):

> "Other advances.—SIPC may advance to the trustee such moneys as may be required to effectuate subsection (b)(1)(A). SIPC shall advance to the trustee such moneys as (with those available pursuant to subsection (d)) may be required to effectuate subsection (d)."

The petition also appears to rely on a portion of Section 60d of the Bankruptcy Act (11 U.S.C. § 96d) but misquotes approximately the last three lines. Section 60d provides, in pertinent part:

> "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The erroneously quoted portion in the petition does not appear material to the issues presented.

This is the first occasion upon which the 1970 Act has come before this Court for review. To assist the Court there is annexed an Appendix which summarizes the history, purposes and provisions of the 1970 Act as well as the structure, role and authority of SIPC thereunder. To some extent this brief assumes familiarity with that Appendix.

Questions Presented

This respondent respectfully submits there is no substantial question of federal constitutional law properly presented in the circumstances of this case, and that the sole issue properly tendered by the petition is whether the 1970 Act or the Bankruptcy Act authorizes the use of assets of Alan F. Hughes, Inc. ("Debtor") or SIPC's funds to pay petitioner for services rendered to the Debtor in unsuccessfully resisting liquidation under the 1970 Act.

Statement of the Case

Petitioner's statement of the case is substantially correct, but it should be augmented as follows. Although the petition so implies, it is the undisputed fact that the petitioner's services were rendered solely in unsuccessfully resisting the Debtor's liquidation under the 1970 Act. Those efforts culminated in an earlier decision by the Court of Appeals that the 1970 Act as applied to the Debtor did not deprive it of its property without due process of law. *Securities and Exchange Commission* v. *Alan F. Hughes, Inc.*, 461 F.2d 974 (2d Cir. 1972).

The petition implies (at page 12) that Mr. Hughes, the principal of the Debtor in liquidation, " . . . was left without any funds to pay counsel for services in the proceeding." Nothing appears in this record concerning Mr. Hughes' personal finances. Moreover this proceeding was for the purpose of liquidating this corporate Debtor, not for the purpose of administering Mr. Hughes' personal estate.

REASONS FOR DENYING THE WRIT

I.

Neither the 1970 Act nor the Bankruptcy Act authorizes compensation for the petitioner's services.

The petition charges the Court of Appeals with a "cavalier approach" (Petition, page 16) and asserts that "[t]he court below ignores that there are two sources from which a respondent's legal counsel can be paid, *i.e.*, the liquidation estate or the SIPC fund . . . ." (Petition, page 14). Neither statement is warranted, as the opinion of the Court of Appeals amply demonstrates. While this respondent relies upon the succinct and cogent unanimous opinion of the Court of Appeals, some further comment may be useful to this Court.

The 1970 Act

The Court of Appeals properly refused to torture the words and intent of Sections 6(f)(2) and 6(b)(1)(A) of the 1970 Act [15 U.S.C. §§ 78fff(f)(2) and (b)(1)(A)] so as to extract authority to pay petitioner's legal fees. The obvious design of these provisions, to the extent pertinent, is to advance funds to the trustee in carrying out the purposes of the proceeding. The Court of Appeals was clearly cor-

rect in holding that resisting liquidation is not a specified or reasonably inferred purpose of the proceeding.

The statute involved is unambiguous and requires no construction. See, *e.g., Callanan* v. *United States,* 364 U.S. 587, 596 (1961). Had Congress intended the result sought by petitioner, " . . . we can hardly suppose that it would have failed to use some appropriate language to express that intention." *Shamrock Oil and Gas Corp.* v. *Sheets,* 313 U.S. 100, 107 (1941). Whatever may be the remote constitutional implications (*infra,* page 11), this clear statutory language as applied in this case does not present a question which ought to be reviewed by this Court. If the Court of Appeals rejected petitioner's contention with "dispatch" (Petition, page 16), the ease of resolving the issue resulted from the petitioner's untenable distortion of statutory language and not from a "cavalier" judicial attitude.

Bankruptcy Act—Section 64a(1)

Section 6(c)(1) of the 1970 Act [15 U.S.C. § 78fff(c)(1)] makes certain sections of the Bankruptcy Act applicable to SIPC liquidations, including Section 64a(1) [11 U.S.C. § 104a(1)]. Unlike Section 6(b)(1)(A) of the 1970 Act, Section 64a(1) does provide for the compensation of debtors' attorneys when appropriate. As the Court of Appeals observed (pages 403-404), the petitioner conceded that all the cases construing Section 64a(1) limit compensation to services that aid in the administration of the estate, and deny compensation for services rendered in resisting bankruptcy.

The pertinent provision in Section 64a(1) has remained substantially unchanged since the Bankruptcy Act of 1898. 3A COLLIER ON BANKRUPTCY, ¶62.31[1], pp. 1596-1599 (14th

ed. 1972). Its predecessor was Section 64b(3). The universally accepted construction of this provision, as summarized by the Court of Appeals, has its roots in Justice Holmes' opinion in *Randolph* v. *Scruggs*, 190 U.S. 533, 538-540 (1903) and Chief Justice Hughes' opinion in *Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472, 476 (1933). See 3A COLLIER, *op. cit. supra*, ¶ 62.05[2], p. 1431. It is now well settled that a bankrupt's attorney may only be compensated for services which either (a) confer a direct pecuniary benefit upon the estate, or (b) aid the administration of the estate usually in connection with the bankrupt's duties under Section 7 of the Bankruptcy Act [11 U.S.C. § 25]. See, *e.g.*, *In Re Schumaker Construction, Inc.*, 346 F.2d 353, 355 (7th Cir. 1965); *Lewis* v. *Fitzgerald*, 295 F.2d 877 (10th Cir. 1961), *cert. denied*, 369 U.S. 828 (1962); *In Re Munford*, 255 Fed. 108, 115 (E.D.N.C. 1919); *In re Mayer*, 101 Fed. 695, 696 (E.D. Wisc. 1900); *In re Michel*, 95 Fed. 803 (E.D. Wisc. 1899); *In re Colonial Distributing Company*, 314 F. Supp. 418 (D.S.C. 1970); *In re Eastwood*, 239 F. Supp. 847, 848 (D. Ore. 1965); *In re New York Investors, Inc.*, 48 F. Supp. 900 (E.D.N.Y.), *aff'd*, 138 F.2d 881 (2d Cir. 1943); *In re Herald-Post, Inc.*, 21 F. Supp. 231 (W.D. Ky. 1937); *In re Owl Drug Co.*, 16 F. Supp. 139 (D.Nev. 1936), *aff'd*, 90 F.2d 823 (9th Cir. 1937); *In re Evenod Perfumer, Inc.*, 4 F. Supp. 916 (S.D.N.Y.), *aff'd*, 67 F.2d 878 (2d Cir.), *cert. denied*, 291 U.S. 671 (1933).

Under the foregoing rule various non-conforming services have been held not compensable. See 3A COLLIER, *op. cit. supra*, ¶62.31[4], p. 1610. Among those are services rendered resisting bankruptcy, the noncompensable character of which was first established by this Court in *Randolph* v. *Scruggs, supra* at 539-540. Research has dis-

closed no exception to this rule. See, *e.g., In re Munford, supra* at 115; *In re M. Zier & Co.,* 142 Fed. 102, 104 (7th Cir. 1905), *aff'g* 127 Fed. 399 (D.Ind. 1904); *In re Garrett Road Corp.,* 256 F. Supp. 709, 712-713 (E.D.Pa. 1966); *In re Owl Drug Co., supra* at 147; *In re Rothman,* 14 F. Supp. 241, 243 (S.D.N.Y.), *aff'd,* 85 F.2d 51 (2d Cir. 1936); *In re Evenod Perfumer, Inc., supra* at 917.

Bankruptcy Act—Section 60d

The Court of Appeals quite properly gave Section 60d (11 U.S.C. § 96d) the meaning required by its unambiguous terms. The petitioner makes no attempt to demonstrate error. Brief comment seems appropriate to show that the holding of the Court of Appeals is not only correct but also reflects well-established law.

The relevant portion of Section 60d has remained substantially unchanged since its adoption as part of the Bankruptcy Act of 1898. *Conrad, Rubin & Lesser* v. *Pender,* 289 U.S. 472 (1933); *In re Wood,* 210 U.S. 246 (1907). As this Court observed in the *Wood* case (at page 253) Section 60d was a *sui generis* measure designed to protect against the tendency of failing debtors to enter into improvident legal retainers in times of financial difficulty. Hence Section 60d is not a grant of authority to pay counsel fees for services rendered after bankruptcy, but rather a vehicle for protecting bankrupt estates by subjecting all legal fees paid for services in contemplation of bankruptcy to judicial scrutiny. *In re Louisiana Loan and Thrift Corp.,* 416 F.2d 898, 900-901 (5th Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); *Bass* v. *Olsen,* 378 F.2d 818 (9th Cir. 1967); *In re Buchanan,* 66 F.2d 416 (2d Cir. 1933); *In re Falk,* 30 F.2d 607 (2d Cir. 1929); *In re Rolnick,* 294 Fed. 817 (2d Cir.

1923); *In re Autocue Sales & Dist. Corp.*, 167 F. Supp. 672 (S.D.N.Y. 1958); *In re Knickerbocker Leather & Novelty Co.*, 158 F. Supp. 236 (S.D.N.Y. 1958), *aff'd*, 265 F.2d 219 (2d Cir. 1959). Section 60d only permits the retention of reasonable fees actually paid. Unpaid fees for services rendered before bankruptcy can only be claimed by the attorney as a general creditor. See *Bass* v. *Olsen, supra.* Section 60d has been held constitutional. *Davis* v. *Negin*, 357 F.2d 154 (6th Cir.), *cert. denied*, 385 U.S. 824 (1966).

The distinction between Section 60d and Section 64a(1) was noted in *In re David Bell Scarves*, 61 F.2d 771, 773 (2d Cir. 1932), *aff'd sub nom. Conrad, Rubin & Lesser* v. *Pender, supra*: "The former [section 60d] relates only to services to be rendered before bankruptcy is instituted, *In re Rolnick*, 294 F. 817 (C.C.A. 2); the latter [section 64(b) (3)] in general to services after petition is filed." See also 3A COLLIER, *op. cit. supra*, ¶ 60.68, p. 1143. Section 60d clearly does not authorize compensation to this petitioner. The refusal of the Court of Appeals to subvert this section can hardly be a basis for further review by this Court.

Petitioner's Contentions

In order to force an untenable construction of the foregoing statutes, and a departure from settled law, the petitioner portrays SIPC as a juggernaut against which the securities industry must be protected by financing attorneys who stand ready in its defense. Thus the petition asserts that SIPC seizes and impounds assets (pages 12 and 15); that without the payment of counsel fees SIPC would be possessed of "ex-parte" and "unfettered and unchallengeable" power to destroy livelihoods and reputations (page 13); that SIPC's opposition to financing petitioner "is raw abuse of power and discretion" (page 14); that SIPC has

"penalty and forfeiture powers" exercisable for mere technical violations of the securities laws (pages 14-15); and that the entire securities industry is in jeopardy of liquidation "on the initiative of SIPC" (pages 15-16). These remarks and the broad thrust of the petition are an unfortunate departure from the realities of law and fact. Response seems unnecessary beyond a few observations and referring the Court to the annexed Appendix.

SIPC is not a government agency nor does it have regulatory or investigative power. Neither does it have power to liquidate a broker-dealer. It merely has the authority to initiate a proceeding analogous to an involuntary proceeding in bankruptcy. This Court is respectfully referred to the companion decision in this case in which the Court of Appeals, consistent with SIPC's own views, outlined the procedures and burden of proof which must be met before a court will authorize the liquidation of a broker-dealer under the 1970 Act. *Securities and Exchange Commission* v. *Alan F. Hughes, Inc.*, 461 F.2d 947 (2d Cir. 1972). In substance that Court held that where a broker-dealer resists liquidation, a court must not only find the existence of at least one of the conditions specified in Section 5(b)(1)(A) of the 1970 Act [15 U.S.C. § 78eee(b)(1)(A)] (*e.g.* insolvency, act of bankruptcy, insufficient net capital), but based thereon it must also confirm SIPC's determination that the broker has failed, or is in danger of failing, to meet its obligations to its securities customers. Once the adjudication is made that the firm's customers require the protection of the 1970 Act, and that the business of the firm must therefore be liquidated, the matter proceeds under the aegis of a court-appointed liquidating trustee who, like any trustee under the Bankruptcy Act, is accountable to the court and subject to its supervision. The

ability of a broker-dealer to resist a proceeding initiated by SIPC is no less than that of a broker-dealer confronted by an involuntary petition in bankruptcy before the 1970 Act, or a broker-dealer so confronted today where the 1970 Act does not apply, or any other subject of involuntary bankruptcy proceedings.

Petitioner also seeks to create an appeal for his views by emphasizing that SIPC's funds are derived from assessments on brokers and dealers. Somewhat similarly, in the court below he unsuccessfully urged that Section 64a(1) could be expanded for his benefit in proceedings under the 1970 Act on the erroneous assumption that the availability of SIPC funds would not adversely affect the rights of customers and general creditors. In addition to the most adequate response of the Court of Appeals (page 404), it should be noted that administrative expenses in these proceedings continue to be a first priority burden upon a debtor's entire estate pursuant to Section 64a of the Bankruptcy Act. Any *advance* of SIPC funds for that purpose is reimbursable to it under Section 6(c)(2)(B)(ii) of the 1970 Act [15 U.S.C. § 78fff(c)(2)(B)(ii)]. The SIPC fund is designed to serve specified statutory purposes in a liquidation proceeding as provided in Section 6(f) of the 1970 Act [15 U.S.C. § 78fff(f)]. The payment of this petitioner's fees is clearly not among them.

As the Court of Appeals held (at page 404), there is no basis upon which to conclude that when it incorporated Section 64a(1) of the Bankruptcy Act "Congress intended to exclude well-settled judicial interpretations of that section." Indeed, the policy against depleting estates by compensating attorneys who unsuccessfully resist involuntary

proceedings finds greater support in proceedings under the 1970 Act. That legislation is intended to protect customers. Unsuccessful contests may well tie up their securities in a fluctuating and perhaps volatile market. Attorneys who contest successfully will be paid by the client. And regardless of success, prudent retainers have the protection of Section 60d. As the Court of Appeals properly noted (page 403), the representation of debtors resisting involuntary proceedings under the Bankruptcy Act "is a frequent phenomenon".

II.

There are no constitutional questions properly before this Court, and in any event the petitioner's constitutional arguments lack substance.

As the Court of Appeals observed (page 403), neither the Debtor nor its principal was deprived of any legal services throughout this proceeding. Nor was the Debtor deprived of due process of law in any other respect. *Securities and Exchange Commission* v. *Alan F. Hughes,* 461 F.2d 974 (2d Cir. 1972). What is therefore at issue in this case is the right of counsel to be paid, and not the Debtor's right or ability to defend.

In the Court of Appeals this respondent contended there was no justiciable controversy relating to the Debtor's constitutional rights, and that if the statutory scheme has any potential for constitutional issues relating to legal representation the resolution of such issues should await the proper case. See, *e.g., Sierra Club* v. *Morton,* 405 U.S. 727 (1972); *Jennings* v. *Mahoney,* 404 U.S. 25 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152 (1970); *Golden* v. *Zwicker,* 394

U.S. 103, 108-109 (1969); *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969); *Flast* v. *Cohen*, 392 U.S. 83, 94-101 (1968). Although the Court of Appeals recognized that the Debtor had been accorded its full measure of constitutional rights, it nevertheless also rejected the constitutional arguments on the merits. For the purpose of this petition it seems unnecessary to supplement that Court's rationale beyond noting that similar contentions were rejected in *In re Evenod Perfumer, Inc.*, 67 F.2d 878, 879 (2d Cir.), *cert. denied*, 291 U.S. 671 (1933). If a proper case arises it will then become necessary to consider the constitutional questions in light of the prevailing American rule governing the compensation of counsel in civil litigation [See, *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)], as well as the plenary power of Congress in the field of bankruptcy including its constitutional authority to determine the extent to which fees may be allowed. See, *e.g. Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 515 (1943); *In re Chicago, M., St. P. and P.R. Co.*, 121 F.2d 371, 375 (7th Cir.), *cert. denied*, 314 U.S. 679 (1941).

In addition to his assertion of constitutional rights on behalf of the Debtor, the petitioner now states that through the statutes in question, as applied by the Court of Appeals, the Congress has taken his " . . . property right in his professional time spent on this case without just compensation." (Petition, page 14). This unsupported argument was not made in the Court of Appeals, and under well-settled principles of appellate review may not be advanced for the first time in this Court. In any event, the argument seems palpably specious. The petitioner rendered services volun-

tarily in the face of the statutes under discussion. The clarity of those statutes and related decisional law are matters with which he is chargeable. Even if there were uncertainty in their meaning and effect, he elected to take the attendant risks.

CONCLUSION

For the reasons stated above, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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